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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 TALUS 7 & 8 INVESTMENT, LLC,

11 Plaintiff,

12 v.

13 ORA TALUS 90, LLC,

14 Defendant.

CASE NO. C16-1502JLR

ORDER TO SHOW CAUSE
REGARDING SUBJECT
MATTER JURISDICTION

15 Before the court is Defendant ORA Talus 90, LLC's ("ORA Talus") notice of
16 removal. (NOR (Dkt. # 3-1).) For the reasons stated below, ORA Talus's notice of
17 removal fails to establish the existence of this court's subject matter jurisdiction. The
18 court, therefore, ORDERS ORA Talus to show cause, within fourteen (14) days of the
19 date of this order, why this matter should not be remanded to state court.

20 The court has "an ongoing obligation to be sure that jurisdiction exists."
21 *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003).
22 Accordingly, the court reviews each new case before it for the existence of federal

1 jurisdiction. *Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 159 F.3d 1209,
2 1211 (9th Cir. 1998) (“If a district court lacks subject matter jurisdiction over a removed
3 action, it has the duty to remand it . . .”). The removal statute is strictly construed,
4 *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941), and there exists a
5 “strong presumption against” removal jurisdiction, *Gaus v. Miles, Inc.*, 980 F.2d 564, 566
6 (9th Cir. 1992). Thus, any doubt as to the right of removal is resolved in favor of
7 remand. *Id.* In determining whether jurisdiction has been established, courts may
8 consider facts “presented in the removal petition as well as ‘any summary-judgment-type
9 evidence relevant to the amount in controversy at the time of removal.’” *Matheson*, 319
10 F.3d at 1090 (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th
11 Cir. 1997)).

12 ORA Talus alleges that this court has federal diversity jurisdiction pursuant to 28
13 U.S.C. § 1332(a) and that removal of the action from state to federal court is proper
14 pursuant to 28 U.S.C. § 1441(b). (NOR ¶ 4.) In order to invoke the court’s subject
15 matter jurisdiction on removal, ORA Talus bears the burden of establishing that there is
16 complete diversity of citizenship between itself and Plaintiff Talus 7 & 8 Investment,
17 LLC (“Talus 7 & 8”), and that the amount in controversy exceeds the sum or value of
18 \$75,000.00. *See* 28 U.S.C. § 1332(a)(1); *see also Urbino v. Orkin Servs. of Cal., Inc.*,
19 726 F.3d 1118, 1121-22 (9th Cir. 2013) (“Where . . . it is unclear or ambiguous from the
20 face of a state-court complaint whether the requisite amount in controversy is pled, . . .
21 the removing defendant bears the burden of establishing, by a preponderance of the
22 evidence, that the amount in controversy exceeds the jurisdictional threshold.” (internal

1 citations and quotation marks omitted)); *Geographic Expeditions, Inc. v. Estate of Lhotka*
2 *ex rel. Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010) (“[I]n a case that has been
3 removed . . . under 28 U.S.C. § 1441 on the basis of diversity jurisdiction, . . . the
4 defendant . . . has the burden to prove, by a preponderance of the evidence, that removal
5 is proper.”). The issue before the court is whether ORA Talus has met its burden with
6 respect to the amount in controversy.

7 ORA Talus alleges that the amount in controversy exceeds \$75,000.00 because the
8 relief sought in the Talus 7 & 8 complaint “will cause ORA Talus to incur damages in
9 excess of \$1 million for which [ORA Talus] will seek relief by way of counterclaim.”
10 (NOR ¶ 4.) ORA Talus also alleges that “although the Complaint does not allege
11 damages in a specific dollar amount, it does allege that the alleged contract breach ‘will
12 result in significant monetary damage.’” (*Id.* (citing Compl. (Dkt. # 3-1 at 6-20) ¶ 3.8).)
13 ORA Talus provides no authority supporting the notion that the court can consider the
14 value of its potential counterclaim in calculating the amount in controversy.

15 The well-pleaded complaint rule governs whether a case is removable to federal
16 court. *See, e.g., Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826,
17 830 n.2 (2002) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*,
18 463 U.S. 1, 10 (1983)). In *Holmes*, the Supreme Court addressed whether a counterclaim
19 that alleged a federal question could serve as the basis for removing a case from state to
20 federal court. *Id.* at 829-30. The Supreme Court used the test applicable to federal
21 question jurisdiction under 28 U.S.C. § 1331, which grants district courts “original
22 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the

1 United States,” to determine whether the Federal Circuit had jurisdiction to hear an
2 appeal under 28 U.S.C. § 1338(a), which grants “original jurisdiction of any civil action
3 arising under any Act of Congress relating to patents.” *Id.* The issue was whether the
4 defendant’s counterclaim could confer “arising under” jurisdiction where it was
5 undisputed that patent law did not appear on the face of the plaintiff’s complaint. *Id.* at
6 830. The Court held no: “a counterclaim—which appears as part of the defendant’s
7 answer, not as part of the plaintiff’s complaint—cannot serve as the basis for ‘arising
8 under’ jurisdiction.” *Id.*; *see also Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815,
9 821-22 (9th Cir. 1985) (holding that a case may not be removed based on a federal
10 question raised in the defendant’s counterclaim).

11 Although the Supreme Court has not applied the rationale of *Holmes* to diversity
12 cases, several lower courts have held that a counterclaim may not be used to meet the
13 amount in controversy requirement of diversity jurisdiction on removal. *See, e.g., Mesa*
14 *Indus., Inc. v. Eaglebrook Prods., Inc.*, 980 F. Supp. 323, 325 (D. Ariz. 1997) (collecting
15 cases) (“The great weight of the authority favors Plaintiff’s position that the amount of a
16 counterclaim may not be considered in determining the amount in controversy.”); *HSBC*
17 *Bank USA, N.A. v. Bryant*, No. 09-CV-1659-IEG (POR), 2009 WL 3787195, at *4 n.5
18 (S.D. Cal. Nov. 10, 2009) (“[T]he court notes that the great weight of authority is against
19 allowing the defendant’s potential recovery to support diversity jurisdiction where the
20 plaintiff’s claimed damages, by themselves, are below the jurisdictional amount—at least
21 in the context of jurisdiction upon removal.”) (citing *Spectacor Mgmt. Grp. v. Brown*,
22 131 F.3d 120, 125 (3d Cir. 1997) (noting that the majority view appears to be “that

1 inclusion of counterclaims should not be permitted in the removal context”); *Rla v. Cape*
2 *Cod Biolab Corp.*, No. C-01-3675 PJH, 2001 WL 1563710, at *3 (N.D. Cal. Nov. 30,
3 2001) (collecting cases and concluding that a “majority of courts faced with this issue in
4 removed cases have held that the amount in controversy is to be determined solely by
5 reference to plaintiff’s complaint”); 14AA Charles Alan Wright, Arthur R. Miller, &
6 Edward H. Cooper, Federal Practice and Procedure § 3706 (4th ed. 2014) (collecting
7 cases, noting the split of authority, and stating that “the majority of the reported cases and
8 almost all of the more recent decisions appears to deny removal”). Thus, the “near
9 unanimous rule,” in the context of cases removed to federal court on the basis of diversity
10 jurisdiction, is that the court should not consider the amount of the removing defendant’s
11 potential recovery on a counterclaim in calculating the amount in controversy. *Bank of*
12 *N.Y. Mellon v. Flores*, No. 2:12-CV-00435 KJM, 2012 WL 1981329, at *6 (E.D. Cal.
13 June 1, 2012), report and recommendation adopted, No. CIV-S-12-0435-KJM, 2012 WL
14 3886097 (E.D. Cal. Sept. 6, 2012). Strict construction of the removal statute against
15 removal provides further support for the majority rule. *Id.*; *see also Gaus*, 980 F.2d at
16 566 (stating that the removal statute is “strictly construe[d]” against removal jurisdiction
17 and there is a “strong presumption” against removal).

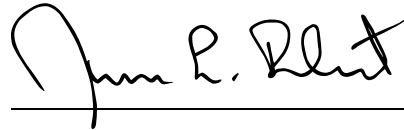
18 If the court excludes ORA Talus’s allegations concerning the value of its potential
19 counterclaim, the remaining allegations are insufficient to demonstrate that the amount in
20 controversy is satisfied for the court to exercise subject matter jurisdiction under 28
21 U.S.C. § 1332. ORA Talus points only to the statement in the complaint that “the alleged
22 contract breach ‘will result in significant monetary damage.’” (NOR ¶ 4 (citing Compl.

¶ 3.8).) In general, the defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. *See Dart Cherokee Basin Operating Co. v. Owens*, --- U.S. ---, 135 S. Ct. 547, 553-54 (2014). ORA Talus’s averment does not constitute a “plausible allegation” that the amount in controversy is met. Furthermore, if the court questions the defendant’s allegation regarding the amount in controversy, the removing defendant bears the burden to demonstrate by a preponderance of the evidence that more than \$75,000.00 is in controversy. *See id.* (citing 28 U.S.C. § 1446(c)(2)(B)); *Geographic Expeditions*, 599 F.3d at 1106-07 (citing *Gaus*, 980 F.2d at 566-67). Here, the court questions ORA Talus’s allegations regarding the amount in controversy. Accordingly, ORA Talus must establish by a preponderance of the evidence that more than \$75,000.00 is in controversy in this matter. *See Dart*, 135 S. Ct. at 553-54.

If subject matter jurisdiction is lacking, the court must remand the case. 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”) Accordingly, the court ORDERS ORA Talus to SHOW CAUSE why this matter should not be remanded to state court. To do so, ORA Talus must (1) provide the court with case authority justifying its inclusion of the value of its potential counterclaim in the amount in controversy, or (2) establish by a preponderance of the evidence that Talus 7 & 8 has placed more than \$75,000.00 in controversy based on the claims alleged in its complaint. ORA Talus must submit this information within fourteen (14) days of the date of this order. If ORA Talus does not timely and adequately comply with this order, the court will remand this action

1 to state court for lack of subject matter jurisdiction. Talus 7 & 8 may, but is not required,
2 to respond to the court's order within the same timeframe. The parties shall limit their
3 responsive memoranda to no more than 5 pages.

4 Dated this 19th day of October, 2016.

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7 JAMES L. ROBART
8 United States District Judge
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